Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 182

NEWBERRY MILLS, INC., PETITIONER,

versus

UNITED TEXTILE WORKERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 120, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS THE FOURTH CIRCUIT

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CITATIONS

	Page
Drake Bakeries, Inc., v. Local 50, American Bakery Workers, 370 U. S. 150	4, 5
International Molders Union, Local 239 v. Susquehanna Casting Co., 283 F. (2d) 80 (C. A. 3, 1960)	7
N. L. R. B. v. Sands Mfg. Co., 306 U. S. 332	6
Portland Web Pressmen's Union v. Oregonian Publishing Co., 188 F. Supp. 859 (S. D. Ore., 1961)	7
Steelworkers v. American Mfg. Co., 363 U. S. 564	7
Steelworkers v. Enterprise Wheel and Car Corp., 363 U. S. 593	7
Steelworkers v. Warrior and Gulf Navigation Corp., 363 U. S. 574	7
Textile Workers Union v. Lincoln Mills, 353 U. S. 448	6

OTHER REFERENCES

Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185(a)	2, 3
28 U. S. C. 1254	2

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The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on March 6, 1963.

OPINIONS BELOW

The opinion of the District Court (App. 12) is unreported. The opinion of the Court of Appeals (App. 15) is reported at 315 F. (2d) 217.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1963. The suit arose under Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185(a).

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254.

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

QUESTION PRESENTED

If an employee without presenting for arbitration the grievance which gave rise to his walkout goes out on strike in violation of a no-strike clause contained in a collective bargaining agreement which also contains an arbitration clause providing for the handling of employee grievances, and is discharged as a result, is he entitled to have his discharge arbitrated under the machinery of the arbitration agreement he chose to repudiate by going out on strike?

STATEMENT

Certain employees of Newberry Mills, Inc., went on strike without presenting the grievances which gave rise to the strike for settlement under the grievance and arbitration procedures set forth in the collective bargaining agree-

ment then existing between the union and the company. This strike was in violation of the no-strike clause of the collective bargaining agreement.* As a result of this strike, the company discharged eighteen of the employees who had gone out on strike.

These eighteen employees remained out on strike in violation of the no-strike clause even though no pickets physically blocked their way, and no violence, coercion, or intimidation was threatened against them. Fifteen of these eighteen employees served actively on a picket line. (See Interrogatories and Request for Admissions and Answers, App. 39-45.)

It is on behalf of these eighteen employees, admittedly participants in a strike which violated the no-strike clause in the collective bargaining agreement between the union and the company that the union filed its complaint seeking to have their discharges arbitrated. Federal jurisdiction was invoked under Section 301(a) of the Labor Management Relations Act of 1947, 29 U. S. C. A., Section 185(a).

The complaint alleged that on June 9, 1960, certain employees violated this no-strike clause and "went out on strike, which strike was not authorized by the plaintiff [the union] herein." The complaint further alleged that the company discharged eighteen of these employees (named in the complaint) even though these employees "were not leaders of the strike. * * *" After setting forth the grievance

* Section XVII—"STRIKES AND LOCKOUTS" of the Collective Bargaining Agreement provides:

(a) The term "strike", as herein used, shall include any concerted stoppage or slowdown of work, or other impairments of the Company's production on the part of the employees within the bargaining unit.

During the term of this contract, the Union shall not authorize or support any strike.

(c) Neither the Local Union nor the International Union shall be liable for damages for any strike, under Section 301 of the Labor Management Relations Act of 1947, which neither the Local Union nor the International Union does not authorize or support during the life of this agreement.

and arbitration provisions of the contract, the complaint alleged that the company refused to consider these discharges as grievances, and prayed that the court specifically enforce the grievance and arbitration procedures of the contract and order the company to submit the grievances, *i. e.*, their discharges, of the named employees to an arbitrator.

The answer of the company admitted that it refused to arbitrate the discharges of the named employees and set up, among other defenses, the following defense: The eighteen employees chose to go on strike in violation of the collective bargaining agreement in order to express their grievances rather than to present the grievances which gave rise to the strike to arbitration as required by the collective bargaining agreement, and therefore they have "unclean hands" and are in no position, through their union, to demand the benefit of the very arbitration clause they breached when they went out on a strike in the face of the no-strike clause.

Under these admitted facts the company and the union both made motions for summary judgment, the company's motions seeking to have the complaint dismissed and the union's motion seeking to compel the company to arbitrate the discharges.

The company's motion was denied and the union's motion granted. From the Order granting the union's motion for summary judgment the company appealed to the Court of Appeals for the Fourth Circuit which affirmed the decision of the United States District Court for the Western District of South Carolina.

REASONS FOR GRANTING THE WRIT

The decision herein misinterprets the decisions of this Court. The Court of Appeals based its decision on *Drake Bakeries, Inc., v. Local 50, American Bakery Workers*, 370 U. S. 254 (1962). In that case the employer brought suit

for damages for an alleged breach of the no-strike clause of a collective bargaining agreement. The Union denied any strike had occurred and sought a stay of the suit pending arbitration of the damage claim. In spite of the broad language of the arbitration clause the employer sought to avoid its duty to arbitrate, asserting that the Union by violating the no-strike clause, the *quid pro quo* of the arbitration clause, lost its right to assert the arbitration clause. This Court held under these facts that the employer must arbitrate its damage claim. However, it was pointed out in the decision:

> * * * In determining whether one party has so repudiated his promise to arbitrate that the other party is excused **the circumstances of the claimed repudiation are critically important.** (Emphasis added.) In this case the Union denies having repudiated in any respect its promise to arbitrate * * * 370 U. S. at 263.

and

> We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged * * * 370 U. S. at 265.

In the *Drake Bakeries case* the Union **for its own benefit** when it was sued for damages for a strike **which it claimed did not occur,** invoked the arbitration clause. In the *Newberry Mills case* the union, **not for its own benefit** but for the benefit of **individuals who admittedly struck in violation of the no-strike clause,** seeks to have these individual's discharges arbitrated. These individuals admittedly have "unclean hands" and it is respectfully urged the *Newberry Mills case* falls within the reservations quoted above in the *Drake Bakeries case.*

The decision herein encourages industrial strife.

Congress, in enacting the National Labor Relations Act of 1935, and the Labor Management Relations Act of 1947, had as its primary purpose the elimination of industrial strife which imperiled the free flow of commerce.

The National Labor Relations Board which is largely charged with the administration of these Acts has as its primary objective the elimination of industrial strife. While these Acts protect employees in their right to engage in concerted action for mutual aid and protection, concerted action in the form of a strike in violation of a no-strike clause in a contract is not a protected activity under the Acts, and employees who engage in such concerted action are subject to discharge. *National Labor Relations Board v. Sands Manufacturing Company*, 306 U. S. 332. Title III of the Labor Management Relations Act of 1947 upon which the Complaint of the union is based in this case cannot be divorced from Title I of this Act which gives no protection to strikers who violate the no-strike clause of a collective bargaining contract. To do so would be to defeat the thrust of the statute which is to eliminate industrial strife which imperils the free flow of commerce. However, this is precisely what the discharged employees wish. They wish to have arbitration of their discharges by an order for specific performance, even though they flagrantly violated the no-strike clause and have unclean hands. To allow relief to employees in these circumstances would be to permit them to take advantage of their own wrongful acts and utilize one section of the Act, Title III, to frustrate another section, Title I.

There is confusion among the circuits on the issues herein presented. After announcing the *quid pro quo* equation of no-strike and arbitration clauses in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, this Court stated:

> We conclude that the substantive law to apply in suits under section 301 (a) is federal law which the courts must fashion from the policy of our national labor laws. 353 U. S. at 456.

The case here presented is one in which this Court should "fashion" substantive law for the guidance of the Courts of Appeal.

In *International Molders Union, Local 239 v. Susquehana Casting Co.*, 283 F. (2d) 80 (3d Cir. 1960), the Court of Appeals for the Third Circuit relying upon what the court took to be the teachings of this Court in the *Steelworkers cases*, 363 U. S. 564 *et seq.* held that a strike in violation of the no-strike clause did not defeat the Union's application for an order to arbitrate the discharge of employees for engaging in the strike.

In *Portland Web Pressmen's Union v. Oregonian Publishing Co.*, 286 F. (2d) 4 (C. A. 9, 1961), the Court of Appeals, Ninth Circuit, had before it this same question, but decided the case on other grounds, expressly refusing to rule on the question of whether a strike in violation of the no-strike clause barred the Union in a suit for specific performance for arbitration of employee's discharges resulting from these employees' participation in the strike. The District Court had in the same case, *Portland Web Pressmen's Union v. Oregonian Publishing Company*, 188 F. Supp. 859 (S. D. Ore., 1961), held that employees who struck in violation of the no-strike clause were not entitled to have their resulting discharges arbitrated:

> Without question, the obligation of the plaintiff and its members to continue work was required as one of the steps in the grievance procedure. Full performance of Section 5 (no-strike clause) of the contract is a requisite to a demand for performance under Section 4. (Grievance and arbitration processes.) *Cameo Press v. Kokomo Paper Handlers' Union, supra; Peoples v.*

Southern Pacific Co., supra. The plaintiff cannot ignore the portion of the grievance procedure under which it is obligated and at the same time require performance by defendant of another requirement of the same procedure. *Cunco Press v. Kokomo Paper Handlers' Union, supra; Peoples v. Southern Pacific Co., supra; Textile Union Workers v. Lincoln Mills, supra.* 188 F. Supp. at 867.

The Courts of Appeals need guidance on the *quid pro quo* equation as it applies to employee grievances for discharges arising out of strikes in violation of no-strike clauses.

The decision herein fails to consider the petitioner's defense of "unclean hands", even though the suit is one in equity for specific performance. While the courts are not bound to traditional concepts of contract law in fashioning a body of substantive law to apply to suits under section 301 (a), petitioner does not believe this Court has abandoned completely the common law in 301 (a) suits. The suit here before the Court is one for specific performance in equity. The employees on whose behalf relief is sought by the Union admittedly have unclean hands, *i. e.*, these employees struck in violation of the no-strike clause even though there was an arbitration procedure under which they could express their grievances. Under the "unclean hands" doctrine traditionally applied by equity courts these employees are entitled to no relief.

Under the allied common law concepts of (a) failure of consideration (if a no-strike clause is the *quid pro quo* for the arbitration clause), (b) waiver and estoppel, and (c) breach of condition justifying recission, *i. e.*, the employees failed to observe the implied condition precedent to arbitration, staying on the job and not striking, these employees are not entitled to relief.

CONCLUSION

With rights (arbitration for employee grievances) go duties (among them the duty not to strike). For the reasons set out above, this petition should be granted.

Respectfully submitted,

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